FOR ARGUMENT

Supreme Court, U.S.
FILED
NOV 8 1979
MICHAEL RODAK, JR., CLERK

No. 78-1318

In the Supreme Court of the United States

OCTOBER TERM, 1979

HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE, PENNSYLVANIA, PETITIONER

v.

TOWN COURT NURSING CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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In this case the court of appeals held that patients residing in a nursing home who are eligible for Medicaid benefits under 42 U.S.C. 1396 *et seq.*, are entitled under the Due Process Clause to a hearing before the Secretary of Health, Education, and Welfare and appropriate state agencies may terminate the participation of (and payments to) the nursing home in the Medicaid program. This holding was based on the court's conclusion that the federal Medicaid statute and the implementing federal regulations give patients a legitimate expectation of entitlement to—and thus a "property" interest in—continued residence in the nursing home of their choice. This Court granted certiorari to decide the claim of petitioner, the Secretary of Public Welfare of Pennsylvania, that this holding is erroneous.

Respondent patients (hereinafter "Patients") and *amici* supporting them contend that (1) this Court has no jurisdiction to decide petitioner's claims, and that even if it does, petitioner did not preserve her claims; (2) for these and other reasons, the writ of certiorari should be dismissed as improvidently granted; (3) apart from federal law, the Patients have a protected property interest based on contract and state law; (4) the court of appeals correctly decided that federal law and regulations give patients a protected property interest in continued residence in the home of their choice; (5) termination of a home's program participation results in "transfer trauma" which reduces the level of Medicaid benefits to which the patients are statutorily entitled; and (6) even if patients have no property interest in the matter, they have a protected "life" or "liberty" interest in continued residence in the home of their choice. These contentions are incorrect.

1. The procedural posture of this case presents two distinct questions: (1) whether this Court has jurisdiction to consider petitioner's contentions; and (2) if so, whether the Court should nevertheless decline to consider them because of petitioner's failure to argue them to the court of appeals.

As we argued in our opening brief (pages 17-20), the Court clearly has jurisdiction to consider petitioner's claims despite the fact that her predecessor did not file an appeal from the district court's judgment. That is so because the district court's judgment was in part in petitioner's favor (*i.e.*, to the extent that it denied plaintiff's motion to extend the preliminary injunction, which had prohibited the State and HEW from discontinuing Medicaid payments to the home, from removing patients from the home, and from prohibiting the placement of additional Medicaid patients; see A. 22a-23a; C.A. App. 222-223, HEW Br. 9-10) and in part

adverse to petitioner (*i.e.*, to the extent it provided that "the defendants [petitioner's predecessor and the Secretary of HEW] shall not withhold payments for services actually rendered to patients" (A-117a)). The patients appealed from the part adverse to them (and favorable to petitioner) and the Third Circuit reversed. Petitioner may certainly seek this Court's review of an adverse judgment that she suffered as appellee.[1] The Patients and amici overlook this point.

In our view, petitioner may also seek review of the Third Circuit's affirmance of the portion of the judgment adverse to her because the Secretary of HEW, to whom it was also adverse, did appeal from that portion of the judgment. We believe it was not necessary for petitioner to file a surplus notice of appeal (see HEW Br. 18-20).[2]

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[1]The two parts of the district court's judgment are not logically consistent because the grounds that would support affirmance of the part favorable to petitionrer would logically call for reversal of the part adverse to her, and vice versa. But that fact does not bar petitioner, who was an appellee in the court of appeals, from challenging the court of appeals' reversal of the part of the judgment in her favor.

It is true that there is some uncertainty with respect to the question whether a party who prevailed below may advance arguments in a reviewing court that would call the scope of the judgment into question even if he is satisfied to accept that judgment. See R. Stern & E. Gressman, *Supreme Court Practice* 480-486 (5th ed. 1978). We believe the better view, supported by *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) and Stern & Gressman, *supra*, is that a party who is content to accept an affirmance may make any argument in support of a judgment without having to file a cross appeal or cross petition, even if the acceptance of the argument would entitle him to greater rights in future cases. But even if we are wrong, that would not deprive the Court of jurisdiction to consider petitioner's claims, because a party can always advance arguments that are necessary to support a judgment in its favor.

[2]Even if we are wrong in this latter respect, it would not affect the Court's jurisdiction to consider and rule on petitioner's claim's on the merits, which is advanced in defense of the part of the district court judgment favorable to petitioner, but would only affect the disposition of the case; that is, it might require affirmance of that part of the district court's judgment adverse to petitioner.

Because petitioner's predecessor took no position on the merits in the court of appeals, it is a somewhat more difficult question whether the Court should consider petitioner's argument as a matter of sound practice. We believe that it should. The general rule that the Court will not consider claims not presented in a lower court is based on principles of sound administration, but it is not jurisdictional and it is not inflexibly applied. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976), and authorities cited. It should not bar consideration of petitioner's claims because those claims were presented to and decided by the court of appeals on the Secretary of HEW's appeal from the part of the judgment in favor of the patients. This constituted an adequate representation in the court of appeals of the position petitioner now takes in this court.

There is no merit to the Patients' further claim (Br. 22-25) that the Court may not consider the claims of the Secretary of HEW and may not reverse the judgment of the court of appeals adverse to the Secretary. In this case, the court of appeals issued a single judgment against petitioner and the Secretary of HEW (Pet. App. 30a), and, as we stated in our opening brief (page 19 n.28), this Court's rules contemplate that appellees and respondents can join appellants or petitioners in urging reversal of judgments without filing duplicative appeals and petitions so long as the grounds on which they seek reversal were presented in the jurisdictional statement or petition for certiorari and were adequately preserved below. See Rules 10(4), 21(4).[3]

[3] *Ryerson* v. *United States*, 312 U.S. 405, 408 (1941), and *LeTulle* v. *Scofield*, 308 U.S. 415, 421 (1940), on which Patients rely (Br. 25), are not to the contrary. Those decisions merely involve the established rule that an appellee or respondent may not, without filing a separate appeal or petition for a writ of certiorari, seek relief that would alter the judgment below and that is beyond the scope of relief sought in the initial appeal or petition. They do not establish that every party who is aggrieved by a judgment in the same way as the initial appellant or petitioner must file separate and duplicative appeals or petitions in order to challenge the judgment below on the same grounds. See HEW Br. 19 n.28.

The Patients also contend (1) that their complaint never sought relief against the Secretary of HEW and they do not now seek relief against the Secretary (Br. 20, 25) and (2) that the judgment of the district court did not run against the Secretary (Br. 22, n. 25). The second claim is incorrect. The district court's final judgment provided that the defendants (including the Secretary of HEW) shall " 'not withhold payments for services actually provided to patients.' "[4] Moreover, the court of appeals also ordered injunctive relief against the Secretary of HEW (Pet. App. 29a).

The Patients' claim that they never sought relief against the Secretary of HEW is puzzling. The single complaint in this case was filed on behalf of Town Court Nursing Center, Inc., and six of its patients (respondents here) and named as defendants both Frank S. Beal (petitioner's predecessor as Secretary of Public Welfare of Pennsylvania) and the Secretary of HEW. Although the count of the complaint relating specifically to the patients was entitled "(Emma Cooper, et al. v. Beal)," it asserted a right to a hearing only under federal regulations and the federal Constitution (A. 10a-11a). Furthermore, the

[4] It is true that under the statutory mechanism of the Medicaid program, the state agency directly pays participating nursing homes for services provided to eligible Patients, and the federal government reimburses the states for a portion of those payments. But the order of the district court is not limited to enjoining the state defendant from withholding state payments to the home; it appears also to enjoin the federal defendants from withholding federal reimbursements to the state for such payments.

complaint's single prayer for relief stated that "plaintiffs request * * * the following preliminary and permanent relief against the defendants herein * * *" (A. 12a), and the Patients have never suggested in their briefs to the district court or the court of appeals that their complaint sought relief only against the state defendant. Certainly those courts assumed the contrary.

If the Patients' present assertions about the intended scope of their complaint were accepted -and we see no reason not to accept them -it would not follow (as the Patients contend (Br. 25)) that the Secretary of HEW is precluded from seeking reversal of a judgment that is binding upon her. Instead, the correct disposition should be for this Court to direct the lower courts to vacate any judgment against the Secretary of HEW simply because the complaint never sought such relief. Under that disposition, however, the Court would still have to resolve petitioner's claims on the merits; and, as a respondent in the case, the Secretary of HEW may under the Court's rules present arguments in support of petitioner's contention that the judgment of the court should be reversed. See page 4, *supra*.

2. Amici Legal Aid Society of New York City, et al., argue that the writ of certiorari should be dismissed as improvidently granted because the reviewability of petitioner's claims is questionable and because HEW intends to institute rulemaking with respect to the participation of nursing home patients in the termination process (Br. 7-31). Those considerations do not warrant dismissal of the writ.

If the Court agrees with our submission that its review of petitioner's claim is not precluded by jurisdictional or prudential considerations, the fact that their reviewability may be open to some question provides no reason for

dismissing the writ. The court of appeals has entered a judgment against petitioner and the Secretary of HEW on the basis of its lengthy analysis of statutory and constitutional questions that are recurring and important and as to which there is some conflict of opinion among the courts of appeals (see HEW Br. 32-33 & n.42). Those questions are clearly presented and their importance is not diminished by any uncertainty about petitioner's ability to present her claims.

Nor is the importance of the question diminished by the fact that HEW intends to institute rulemaking with respect to patient participation. First, the constitutional theory adopted by the court of appeals has implications reaching far beyond the administration of the Medicare and Medicaid statutes (see HEW Br. 29-32). It is, moreover, important that an agency considering rules and procedures in this area be able to weigh and resolve all of the relevant policy considerations free from a judicial order based on an erroneous theory of the agency's constitutional obligations (see HEW Br. 37-41).

3. On the merits of the constitutional issues presented for this Court's review, the Patients argue (Br. 26-33) that, apart from whatever rights the federal statutes and regulations may provide, Medicaid patients have a "property" interest in continued residence in the nursing home of their choice based on state statutes and based on their state law rights as third party beneficiaries to contracts between the state agency and their nursing home. These claims are insubstantial.

First, the state Medicaid statute and regulations cited by respondents provide no different or greater rights (or legitimate expectations of entitlement) to Medicaid patients than the federal statutes and regulations

discussed in the various opinions of the court of appeals.[5] Respondents do not assert or identify any difference in the rights provided by the two statutory schemes, and for the reasons fully discussed in our opening brief, neither provides patients with a legitimate claim of entitlement to continued residence in the nursing home of their choice.[6]

The Patients' attempt to find protected property rights in the contract between the state agency and the nursing home is equally unpersuasive. A contract between a citizen and the state may create "property" rights protected by the due process clause (see, *e.g.*, *Perry* v. *Sindermann*, 408 U.S. 593, 601-602 (1972)). Furthermore,

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[5]Perhaps for that reason the state program was not separately discussed in the court of appeals' opinions. Another reason may have been that respondents did not rely on them. Neither the complaint nor plaintiffs' briefs in the district court made any reference to state law claims. Although their reply brief in the court of appeals generally asserted that petitioner's predecessor had an obligation based on state law independent of any obligation of the Secretary of HEW (see C.A. Reply Br. 8-9; see also *Town Court Nursing Center, Inc.* v. *Beal*, 586 F. 2d 266, 279 (3d Cir. 1978)), the brief provided no analysis of any state statutes and made no attempt to show that that they provided greater property rights to Medicaid patients than do the federal statutes or regulations. Moreover, the Patients placed no reliance whatever on the contracts between the nursing home and the state agency.

[6]Amici Legal Aid Society of New York City et al. suggest, as an alternative to dismissal of the writ, that this Court vacate the judgment below and remand the case to the court of appeals to consider these allegedly adequate state grounds (Br. 27-31). In our view such a remand would be unwarranted because the state law grounds are manifestly insubstantial. Furthermore, little benefit (and considerable delay) could be expected from a remand to allow the court of appeals to consider state law questions that the Patients failed adequately to present in their initial appeal. Since the state statutes and regulations largely parallel the federal scheme, the court of appeals would be likely to conclude that the state scheme also established protected property rights under the same analysis employed in the opinions below. For the same reasons argued in our present briefs, we and petitioner would still contend that any such conclusion was error under established principles.

we may assume the Patients' premise that the rights of a third party beneficiary may also constitute protected property rights, although the proposition seems questionable. But in order to show a deprivation of property rights triggering the procedural protections of the Due Process Clause, a person must still show a breach *by the state* of *his* rights under the contract, or of contract provisions adopted for his benefit. Respondent patients have shown no such breach. They have referred generally to the contract between the state agency and the nursing home and have asserted their rights as third party beneficiaries, but they have identified no contract provision and have pointed to no breach.

In fact there has been no breach by the state agency of any provision of the agreement that might arguably vest rights in the patients. The standard agreement (set forth in Patients' Br. A24-A29) obligates the nursing home to meet federal and state health and safety standards and comply with a number of other requirements. It requires the state agency to undertake several actions, including making payments to the home in accordance with its regulations, determining patient eligibility, and assisting in transferring patients (*id.* at A28). It also provides, however, that "[f]ailure by the Nursing Home to comply with laws or regulations shall entitle the Department to terminate the Agreement forthwith" (*id.* at A28) and that "[t]his Agreement may be terminated by either party upon 30 days advance written notice" (*id.* at A29). In this case, the state agency properly exercised its termination rights under the contract and respondents have made no showing, or even claim, that it did not. It may be that the nursing home's failure to comply with the agreement (*e.g.*, to comply with state and federal standards) would constitute a breach for which patients could sue the *home* as third party beneficiaries if they were injured by such a

breach,[7] but that would not establish any deprivation of contract or "property" rights by the state that would require the state to provide notice and hearing under the Due Process Clause. In short, the Patients cannot prevail simply by asserting the existence of a contract to which they are allegedly third party beneficiaries and without any analysis of the contract provisions relied on.[8]

4. The Patients and *amici* supporting them contend that the court of appeals correctly concluded that the Medicaid statutory and regulatory scheme gives Medicaid patients a legitimate expectation of entitlement to receive covered care from the nursing home of their choice and thus to contest any decision to terminate the home's program participation in an evidentiary hearing (see Patients Br. 30-35; Legal Aid Society of N.Y. City Br. 43-55; National Citizens' Coalition Br. 16-23). In our opening brief we have demonstrated that the statutes and regulations do not entitle patients to receive covered care from a home found to be unqualified by HEW and the responsible state agencies and that they give give patients no right to a hearing on the qualifications of the home (Br. 26-29). We also argued that under the court of

[7]Indeed, all the cases cited by the Patients in support of their third party beneficiary theory (Br. 26-30) are cases in which the third party beneficiaries have sued private parties, including nursing homes, for breaches of agreements between the private party and the state.

[8]Amicus National Citizens' Coalition for Nursing Home Reform relies on an even more tenuous source of "property" rights –the contract that some nursing homes have with their patients (Br. 14-15). A simple breach of contract by a private party is not governmental action to which the Due Process Clause applies. More important, the patients here are not complaining about any actions by their nursing home but are challenging actions of the state agency, and perhaps HEW (see pages 5-6, *supra*). Any contracts between patients and their nursing homes have no relevance to such actions.

appeals' apparent constitutional theory, persons would have due process rights with respect to a host of governmental actions directly affecting the rights of other persons and having only an indirect effect on the interests of the persons claiming the right. For example, it would give a person a right to be heard in a proceeding to delicense or disbar the physician, pharmacist, or attorney of his choice because of professional incompetence (Br. 30).

The Patients and *amici* have offered nothing to rebut our view of the statutes and regulations. Moreover, that view has been HEW's consistent view in this and other cases. Hence, even if the question were subject to doubt, it is well settled that an agency's interpretation of its statutes and regulations should be accepted if it is reasonable. See, *e.g.*, *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978). Nor do the Patients and *amici* appear to deny, or seriously contest, the significant implications that would follow from their constitutional theory in many other contexts.[9]

[9]Amicus National Citizen's Coalition For Nursing Home Reform suggests (Br. 34) that Medicare and Medicaid programs are different because the main purpose of those programs is to benefit patients, but that is hardly a satisfactory basis for distinction. For example, the principal purpose of most professional licensing programs and delicensing procedures is to protect patients and clients of professionals. There are also many other contexts in which the government regulates or has contractual relationships with certain persons for the principal purpose of protecting or benefiting other persons. Yet, as we argued in our opening brief, government could hardly function if, in taking action directly against one person, it had to provide notice and evidentiary hearings to all other persons who are affected by the action and whom the government had a general intention to benefit.

5. Patients and *amici* contend that a decision to terminate a nursing home's participation in the Medicare and Medicaid programs does result in a direct reduction of benefits to which Patients are statutorily entitled: they argue that practical effect of termination is to cause "transfer trauma" to Patients and that their statutory benefits are thus reduced by the amount of this psychological injury (Patient's Br. 46-48; National Citizen's Coalition Br. 26-28). The court of appeals did not reach this contention (see *Klein* v. *Califano*, *supra*, 586 F. 2d at 259 n.16; HEW Br. 27 n.37) and it is without merit. The benefits that these statutes and regulations (like most, if not all, welfare programs) grant to eligible recipients are monetary, not psychological benefits. The "transfer trauma" argument is simply another way of arguing that the procedural protections of the Due Process Clause turn not upon the nature of the rights in question but upon the magnitude of the impact of governmental action upon a person—an argument that this Court has consistently rejected. See, *e.g.*, *Greenholtz* v. *Nebraska Penal Inmates*, No. 78-201 (May 29, 1979), slip op. 5; see generally HEW Br. 23-26).

6. Finally, the Patients and *amici* argue that even if a decision to terminate a nursing home does not implicate the "property" rights of patients, it implicates their "life" and "liberty" interests (Patients Br. 35-40, National Citizens' Coalition Br. 5-16). This argument is based on the contention that the practical effect of a termination decision is that most Medicaid patients must transfer to qualified homes in order to receive covered care, and that such transfers threaten the lives of many elderly and infirm patients and disrupt the associational ties developed in the terminated home. We do not belittle the serious consequences that may attend a termination

decision.[10] Because of those consequences, HEW and state agencies devote a very substantial part of their administrative efforts, first, to bringing nursing homes into compliance with health and safety standards without termination, and, failing that, to relocating patients to other qualified homes. But there is no merit to the contention that governmental decisions implicate "life" and "liberty" interests—any more than they implicate "property" interests—simply because their incidental effects are asserted to enhance the risk of death or to sever associational ties. Innumerable governmental decisions may be reasonably asserted to have such effects—from designing highways and establishing speed limits to condemning apartment buildings—but no one could seriously contend that every motorist, apartment resident, or neighborhood friend has a constitutional right to notice and an evidentiary hearing before such decisions can be made. As this Court stated in *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, slip op. 5: "Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protections."

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[10]We note, however, that the extreme assertions by the Patients and amici about the life-threatening consequences of transfers do not reflect the unanimous opinion of the profession. Indeed a recent review of the studies on this matter concludes that:

> [T]he findings have been ambiguous and appear to be contradictory.
>
> Six studies have found that the effects of relocation resulted in an increase in mortality rates * * *.
>
> On the other hand, 12 studies found that relocation had no significant effect on patient mortality rates * * *.
>
> One study found the relocated group had a significantly lower death rate * * *. Borup, Gallego, and Hufferman, *Relocation and its Effect on Mortality*, The Gerontologist, Vol. 19, No. 2, page 136 (1979).

CONCLUSION

For the reasons stated herein and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

NOVEMBER 1979

DOJ-1979-11